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No. _____

In The

Supreme Court of the United States

J. SCOTT STUBER,

Petitioner,

v.

STATE OF KANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the exclusive regulatory jurisdiction of the Commodity Futures Trading Commission preempts the Kansas Securities Act depriving Kansas of subject matter jurisdiction in a criminal case concerning commodities.

2. Whether to require an accused individual to prove the non-existence of jurisdiction impermissibly shifts the burden of proof from the prosecution to the accused in violation of the individual's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioner

J. Scott Stuber, Wichita, Kansas

Respondent

The State of Kansas

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An opinion in *State of Kansas v. J. Scott Stuber,* In the Court of Appeals for the State of Kansas, Case No. 97-80074-A was filed on March 10, 2000 and is printed beginning on page 1 of the Appendix. A petition for review was denied on June 13, 2000 and is printed on page 37 of the Appendix.

JURISDICTION

The Court of Appeals of the State of Kansas issued its *Order* on March 10, 2000. Petitioner filed a *Motion for Modification or for Rehearing* which was denied on March 29, 2000. Petitioner filed a *Motion for Modification of Order Denying Appellant's Motion for Modification of Opinion or Rehearing on Issue II* which was denied April 17, 2000. Petitioner filed a *Petition for Review* with the Supreme Court of the State of Kansas which was denied on June 13, 2000. This *Petition for Writ of Certiorari* is filed within 90 days of the denial of the *Petition for Review*. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

The Fourteenth Amendment to the Constitution of the United States

The Sixth Amendment to the Constitution of the United States

7 U.S.C. § 2(i)

7 U.S.C. § 13a-2

7 U.S.C. § 16(e)
17 C.F.R. § 4.13(a)(2)
K.S.A. § 17-1253(a)
K.S.A. § 17-1254
K.S.A. § 17-1255

STATEMENT OF THE CASE

Petitioner J. Scott Stuber was convicted in the Sedgwick County District Court in the State of Kansas of four counts of unlawful acts in connection with the sale of securities in violation of K.S.A. § 17-1253(a); one count of acting as a broker-dealer without being registered in violation of K.S.A. § 17-1254 and one count of offering for sale unregistered securities in violation of K.S.A. § 17-1255. He was sentenced to a term of 60 months imprisonment.

The conduct which formed the basis for Mr. Stuber's convictions involved his solicitation and handling of funds from four investors to be invested in the commodities futures market. Mr. Stuber challenged the state's jurisdiction over this case first by motion to the district court, arguing that it was subject to the exclusive jurisdiction of the Commodities Futures Trading Commission (CFTC). The district court found that *Schlatter v. MoComm Futures, Ltd.*, 233 Kan. 324, 329, 662 P.2d 553 (1983) controlled and that 7 U.S.C. § 2 did not apply. (App. pp. 38-39). Mr. Stuber raised the issue again at trial and following his convictions, he appealed to the Kansas Court of Appeals.

On appeal, Mr. Stuber persisted that the CFTC had exclusive jurisdiction while the government maintained

its position that the Commodities Exchange Act (CEA) did not apply. The government urged the appellate court to apply *Schlatter*, a Kansas case which involved the selling of shares in a limited partnership created for the purpose of pooling funds to invest in the futures market. (App. pp. 14-15). The Kansas Court of Appeals issued a hybrid opinion. It rejected the government's *Schlatter* argument. Instead, it found that although the activities involved were commodities and thus subject to the exclusive jurisdiction provisions of the CFTC, an exception to this exclusive jurisdiction provision applied. The appellate court concluded: 1) Mr. Stuber was a commodity pool operator; and 2) as a matter of law, as a commodity pool operator he was required to be registered with the CFTC. Because the Court reached the conclusion Mr. Stuber was not registered, the Court believed he was "fair game" for prosecution under the Kansas Securities Act. (App. p. 18).

The registration requirement relied upon by the Court of Appeals was never raised at trial or in the briefs of the parties on appeal. Accordingly, in a *Motion for Modification or for Rehearing*, Mr. Stuber asked the Court of Appeals to reconsider, arguing that the state failed to allege or prove any exception to the CFTC and it was improper for the appellate court to make a finding of fact which was absent from the record. (App. p. 32). The Court of Appeals denied relief and elaborated on its previous holding. (App. pp. 32-35). The Court found that the language in 7 U.S.C. § 16(e) did not require CFTC approval of the prosecution. Moreover, the Court found that Mr. Stuber should have presented evidence regarding registration and his failure to do so permitted an inference that the evidence would be unfavorable to him. Therefore, the Court concluded that the record properly

supported the finding that Mr. Stuber was not registered with the CFTC. (App. pp. 34-35). Mr. Stuber again requested reconsideration but his attempts at reconsideration by the Court of Appeals and review by the Kansas Supreme Court were rejected. (App. pp. 36-37).

This Petition for Writ of Certiorari follows.

ARGUMENT FOR GRANTING WRIT

ISSUE 1:

The exclusive regulatory jurisdiction of the Commodity Futures Trading Commission preempts the Kansas Securities Act depriving Kansas of subject matter jurisdiction in a criminal case concerning commodities.

At issue in this case is the competing authority of the CFTC to regulate commodities dealings versus Kansas' ability to exercise subject matter jurisdiction over the same matter. This case presents the important federal question concerning the scope of the Commodity Exchange Act in relation to state regulation of commodity pools. Furthermore, this issue raises the broader question regarding the balance of power between the states and the federal government.

As the Kansas Court of Appeals recognized, Mr. Stuber is a commodity pool operator. Thus, he is subject to the jurisdiction of the CFTC. The Kansas Court of Appeals held that he is also subject to regulation under the criminal provisions of the Kansas Securities Act. When both a state government and the federal government assert jurisdiction, there is a presumption of

concurrent jurisdiction which can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 483, n. 12, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981). In this case, Congress has issued an explicit statutory directive. Under 7 U.S.C. § 2, the CFTC is given exclusive authority to regulate commodities and commodity pool operators. (App. p. 40). The limitations of state jurisdiction are spelled out in 7 U.S.C. § 13a-2. (App. p. 41). It gives states the ability to bring suits in equity or actions at law in federal court. It also gives states the ability to proceed in state court on the basis of any alleged *general* criminal antifraud statute. In both instances, the state is required to give notice to the CFTC. (App. pp. 41-44).

Directly conflicting with these federal statutes are certain provisions of the Kansas Securities Act under which Mr. Stuber was convicted. In relevant portion, K.S.A. § 17-1253 prohibits any person from employing any scheme to defraud in connection with the offer, sale or purchase of any security. (App. 46). K.S.A. § 17-1254 prohibits securities transactions by unregistered individuals and K.S.A. § 17-1255 makes it unlawful to sell or offer to sell any unregistered securities. These statutes prohibit conduct relating to securities yet the Kansas Court of Appeals interpreted the language broadly enough to include commodities. Thus, state and federal regulation both purport to regulate the same activity.

In finding that the Kansas courts have subject matter jurisdiction, the Kansas Court of Appeals erroneously concluded that an exception to the exclusive jurisdiction

of the CFTC applied. The Kansas Court of Appeals further relied on 7 U.S.C. § 16(e)(3) which provides that nothing supercedes or preempts the application of any state statute when a person who is required to be registered under the Act fails to do so. (App. p. 44).

What the Kansas Court of Appeals failed to recognize is that not all commodity pool operators are required to register. Specifically, 17 C.F.R. § 4.13(a)(2) does not require a person to register as a commodity pool operator if total gross capital contribution does not exceed $200,000 and no pool has any more than 15 participants. (App. p. 45). The Kansas Court of Appeals never considered this provision nor did Mr. Stuber have an opportunity to raise it.

The error on the part of the Kansas Court of Appeals demonstrates the need for this Court's intervention. The CEA is a complex body of law designed to give a single expert agency the responsibility for developing a coherent regulatory program for the commodities industry and to prevent the costs and confusion associated with multiple regulators. 120 Cong. Rec. 30,459 (statement of Sen. Talmadge). A single expert agency also reduces the possibility that diverse and conflicting regulation by the states could become a burden on commerce. 119 Cong. Rec. 41,333 (1973) (statement of Rep. Poage). Under the statutes comprising the CEA and its implementing regulations, the rights, responsibilities and authorities of all those individuals directly or tangentially involved with commodities are delineated. In this case, a state government tried to ignore the CFTC and proceed on its own. When the state court muddled through the Act, it either misinterpreted or ignored key provisions. To ignore this

error is to seriously undermine Congress' authority and opens the door to states litigating as they choose to the detriment of the individual. Therefore, this Court is urged to accept this Petition for Writ of Certiorari.

ISSUE 2:

> **When subject matter jurisdiction becomes an issue in a criminal prosecution, to require an accused individual to prove the non-existence of jurisdiction impermissibly shifts the burden of proof from the prosecution to the accused in violation of the individual's rights under the Sixth and Fourteenth Amendments to the United States Constitution.**

In ruling against Mr. Stuber, the Kansas Court of Appeals conditioned subject matter jurisdiction on a fact that it inferred or presumed from the record, i.e., that Mr. Stuber was required to be a registered commodities pool operator and in fact was not registered. Creation of this inference or presumption denies Mr. Stuber his Fourteenth Amendment right to Due Process and his Sixth Amendment right to know the nature and cause of the allegations against him. In effect, it requires Mr. Stuber, the accused, to prove the non-existence of jurisdiction, thereby impermissibly shifting the burden of proof from the prosecution to the accused.

In *Barnes v. United States*, 412 U.S. 837, 841-44, 93 S.Ct. 2357, 37 L.Ed.2d 380 (1973), the Court reviewed the historical basis of criminal law presumptions and inferences under the Due Process Clause. In order for an inference to pass constitutional muster, there must be a " 'rational connection between the fact proved and the

ultimate fact presumed.' ". *Id.* at 841 (quoting *Tot v. United States*, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245, 87 L.Ed. 1519 (1943). It concluded that both statutory and common-law inferences "must satisfy due process standards in light of present-day experience." *Id.* In this instance, the Kansas Court of Appeals agreed with Mr. Stuber that the CFTC had exclusive jurisdiction over commodities transactions. However, on its own initiative the Court concluded that an exception to the exclusive jurisdiction principle applied, reasoning as follows: Mr. Stuber was a commodity pool operator; commodity pool operators are required to be registered; there was no evidence of registration in the record (indeed, registration was never addressed at the trial court level); Mr. Stuber had the burden of proving he was registered; and his failure to do so leads to the conclusion that he was not registered.

The Kansas Court of Appeals' rationale fails in a number of respects. First, not all commodity pool operators are required to be registered and the Kansas Court of Appeals ignored the provisions within the CEA and CFTC regulations which address this issue. That particular issue is addressed in the previous section concerning the CFTC's exclusive jurisdiction. Second, the Court imposes the burden on Mr. Stuber to prove registration when clearly the burden of establishing subject matter jurisdiction rests on the party asserting jurisdiction. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-183, 56 S.Ct. 780, 784, 80 L.Ed. 1135 (1936). Third, the Court imposes on Mr. Stuber an unconstitutional inference or presumption that because he offered no evidence of registration, it can be inferred or presumed that he was

not registered and therefore subject to state regulation. Never, however, was Mr. Stuber allowed the opportunity to present any evidence regarding the registration issue.

Such a result directly contravenes the principle set forth in *Speiser v. Randall*, 357 U.S. 513, 525-526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958): "[W]here one party has at stake an interest of transcending value – as a criminal defendant his liberty – th(e) margin of error is reduced as to him by the process of placing on the (prosecution) the burden . . . of persuading the factfinder at the conclusion of the trial . . . " In other words, the State of Kansas has the burden of showing jurisdiction and in the absence of that proof, a Court cannot rely on an inference or presumption at the price of an individual's liberty.

Subject matter jurisdiction over the offense is as fundamental to a criminal conviction as is proof of each of the required elements. Because the due process clause requires the prosecution to prove each element beyond a reasonable doubt, no less strict a standard should be applied to subject matter jurisdiction when presented as an issue. Accord *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (requiring the State of Maine to prove beyond a reasonable doubt the absence of heat of passion or sudden provocation when the issue is presented in a homicide case in order to comply with the Due Process Clause.) Therefore, this Court is urged to accept this Petition for Writ of Certiorari due to the serious constitutional issues at stake.

CONCLUSION

When it enacted the Commodities Exchange Act, Congress intended that the Commodities Futures Trading Commission exercise exclusive jurisdiction over matters relating to commodities. The Kansas Courts' exercise of subject matter jurisdiction by permitting a prosecution and conviction of an individual who falls under the wing of the CFTC ignores the express statutory directive of 7 U.S.C. § 2. Moreover, it creates a disparity among other litigants who would prefer to take action in state court rather than in a federal forum but have been prohibited by doing so. While this case would be one of first impression for this Court, failure to consider the case would open the courtroom doors to inconsistent standards imposed on individuals and entities involved in commodities trading, increased costs and confusion associated with multiple regulators and the possibility that the diverse and conflicting regulation could become a burden or have a chilling effect on commerce.

In addition to these widespread ramifications, this Court is also urged to accept this Writ due to the implications it has on American criminal law jurisprudence. When a state court is permitted to shift the burden of proof in a criminal case to a criminal defendant, it has far-reaching implications on the Sixth Amendment right to notice of the nature and cause of one's accusations and the Fourteenth Amendment due process of law.

For these reasons, this Court is urged to consider the important questions raised in this Petition for Writ of Certiorari and accept the same.

Respectfully Submitted,

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Corrected

No. 80,074

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

J. SCOTT STUBER,
Appellant.

SYLLABUS BY THE COURT

1.

A defendant's waiver of his or her right to a jury trial is voluntary if the trial court explains to the defendant the rights waived by agreeing to a bench trial and the defendant orally indicates on the record that he or she intends to waive the right to a jury trial.

2.

The Commodity Exchange Act preempts state regulation of the operation of commodity pools. In certain unique circumstances, however, jurisdiction over commodities transactions remains with the states. For example, States may assert extensive jurisdiction over persons who are required to be registered under the Commodity Exchange Act, but have failed to do so.

3.

If jurisdiction to regulate commodities transactions remains with the state, K.S.A. 17-1253 permits prosecution for unlawful acts in connection with the offer, sale, or

purchase of securities even though the defendant also engaged in commodities transactions.

4.

Material facts which must be disclosed under K.S.A. 17-1253(a)(2) include past crimes, outstanding civil judgments, and tax liens. If such disclosures are not made by the seller of securities, the act of selling securities is an unlawful act under the statute.

5.

It can be assumed that in a trial to the court, the trial judge, unlike a jury, possesses sufficient intelligence and expertise to rely on a legally adequate theory when convicting a criminal defendant.

6.

K.S.A. 17-1253(a)(1) prohibits the use of any device, scheme, or artifice to defraud in connection with the offer, sale, or purchase of any security. Because K.S.A. 17-1253(a) is written in the disjunctive, a defendant can violate the statute by using only one of the mechanisms listed therein.

7.

Venue lies in the county where a criminal act occurs. Where one or more elements of a crime occur in one county and other elements of that crime take place in a second county, venue properly lies in either county.

8.

When a defendant's criminal history score would not be affected by an appellate court's finding, the issue is moot and will not be considered on appeal.

Appeal from Sedgwick District Court; THOMAS E. MALONE, judge. Opinion filed March 10, 2000. Affirmed.

Steven R. Zinn, deputy appellate defender, and *Jessica R. Kunen*, chief appellate defender, for appellant.

Doyle Baker, assistant district attorney, *Nola Foulston*, district attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before BRAZIL, C.J., GREEN, J., and WAHL, S.J., assigned.

GREEN, J.: J. Scott Stuber appeals from his convictions of four counts of unlawful acts in connection with the sale of securities, one count of acting as a broker-dealer without being registered, and one count of offering for sale unregistered securities. On appeal, Stuber argues (1) that his waiver of a jury trial was not voluntary; (2) that the trial court lacked subject matter jurisdiction because the transactions in question are subject to the exclusive jurisdiction of the Commodity Futures Trading Commission (CFTC); (3) that he is entitled to a new trial because the State charged multiple alternative allegations in the counts of unlawful acts in connection with the sale of securities; (4) that venue was lacking on one of the charges; and (5) that the trial court erred in overruling his challenge to his criminal history score. We disagree and affirm.

In December 1992, Stuber attempted to organize a corporation to be called SSI, Inc. An actual corporation

was not formed, however, because another corporation had filed under the name "SSI, Inc.," and Stuber made no further efforts to incorporate after learning this fact.

Between July 1993 and January 1994, Stuber solicited funds from Thayne Botterweck, Maurice Bruenger, Larry Farber, and Paul Elder. Stuber told the investors that he was profiting from investments in various commodities and represented he would invest their funds into the SSI, Inc., investment pool in exchange for a percentage of their profits. Stuber solicited more than $90,000 from Elder, $10,000 from Botterweck, $4,500 from Bruenger, and over $90,000 from Farber.

Stuber commingled the investors' money in a checking account with funds from various other sources. An investigator for the Kansas Securities Commission examined records from Stuber's account and discovered that Stuber had invested only $46,400 of the investors' money in the commodities market. Moreover, Stuber did not exclusively trade in commodities but also invested the pooled funds in stocks and mutual funds. Stuber also used the money in the investment account to pay various personal expenses.

Stuber lost all of the investment pool funds, except for $5,000 which was refunded by one broker. However, Stuber managed to deceive the investors by providing most of them with false monthly trading summaries which indicated they were making substantial profits. Botterweck and Elder lost all of the money they gave Stuber to invest. Although Stuber repaid Farber some of his money, Farber's total loss was approximately $55,000. Bruenger did not lose the money he invested, but only because the worthless check Stuber wrote him was not

timely processed by the bank, and the bank reimbursed Bruenger for the face amount of the check.

When Stuber solicited money from the investors he was a convicted felon. Stuber did not tell the investors of his convictions when soliciting money from them, nor did he tell them that he was subject to several business-related civil judgments and a federal tax lien. Moreover, Stuber failed to tell the investors that SSI, Inc. was not incorporated under Kansas law, that he intended to use some of the investors' money for purposes other than investment, that he was not a registered broker-dealer, and that he had not registered the securities he was selling.

Significantly, Stuber failed to tell the investors that while he was serving as president of a corporation called Agri-Data in the early 1990's, he lost more than a million dollars of investor money and that a large portion of the investments was lost trading commodities in his personal account. See *State v. Stuber*, 25 Kan. App. 2d 254, 962 P.2d 1104, *rev. denied* 265 Kan. 889 (1998). In connection with his Agri-Data activities, Stuber was convicted of one count of engaging in business as a broker-dealer without having been registered, one count of offering for sale unregistered securities, and two counts of unlawful acts in connection with the sale of securities. As a result, Stuber was sentenced to 2 to 5 years in the penitentiary and was ordered to pay restitution in an amount exceeding $1.5 million to two defrauded investors. On appeal, however, this court remanded to the trial court to consider the option of community corrections for Stuber.

Before trial in the instant case, Stuber moved to dismiss the charges against him, asserting that the transactions in question involved commodity pools and, as a result, the case was subject to the exclusive jurisdiction of the CFTC. Following a pretrial hearing, the trial court denied the motion to dismiss. Stuber's motion to dismiss was renewed and again overruled at trial.

After a bench trial, Stuber was found guilty of four counts of unlawful acts in connection with the sale of securities and single counts of engaging in business as an unregistered broker-dealer or agent and offering for sale unregistered securities.

Waiver of Right to a Jury Trial

Stuber's first argument on appeal is that he did not voluntarily waive his right to a jury trial. Specifically, Stuber contends that the trial court threatened to deny him an appeal bond if he were convicted following a jury trial. As a result, the issue presented is one of fact, and it is this court's duty to determine whether substantial competent evidence supports a finding that Stuber's waiver of a jury trial was voluntary. See *State v. Boan*, 235 Kan. 800, 805, 686 P.2d 160 (1984).

A criminal defendant has a constitutional and statutory right to a jury trial. United States Constitution, 6th Amendment; Kansas Constitution, Bill of Rights §§ 5, 10; K.S.A. 22-3403(1). The right, however, may be waived by agreement of the defendant, the prosecuting attorney, and the court. K.S.A. 22-3403(1). For the waiver of the right to a jury trial to be valid, the waiver must be "voluntarily made by a defendant who knew and understood what he

was doing." *State v. Irving*, 216 Kan. 588, 589, 533 P.2d 1225 (1975). Moreover, "in order for a criminal defendant to effectively waive his right to a trial by jury, the defendant must first be advised by the court of his right to a jury trial, and he must personally waive this right in writing or in open court for the record." 216 Kan. at 590.

Considering the instant case in light of these principles, Stuber was not denied the right to a jury trial. The transcript of Stuber's jury trial waiver indicates that Stuber voluntarily waived his right with an understanding of what he was giving up. In fact, the following discussion between the trial court and Stuber took place at the jury trial waiver hearing:

> "THE COURT: Your attorney indicates that you're willing to waive your right to a jury trial in this case. What that means is that if this case goes to trial, it will be tried before a judge and you will be giving up your right to have this case tried before a jury of 12 persons; is that what you wish to do?
>
> "MR. STUBER: Yes, I understand that, Your Honor, and that's, I guess, what I wish to do, yes."

The allegation that the trial court coerced Stuber into waiving his right to a jury trial by threatening to deny him an appeal bond if he was convicted by a jury did not arise during any part of Stuber's trial or at the sentencing hearing. In fact, the allegation surfaced nearly a year after the sentence was pronounced when Stuber raised it as an issue on appeal. As noted in the State's brief, "[s]urely, if the trial court had infringed on one of the defendant's

basic constitutional rights, defense counsel would have made an issue of it on the record."

Moreover, Stuber has the burden of furnishing a record which affirmatively shows that prejudicial error occurred in the trial court. Stuber apparently attempted to comply with Supreme Court Rule 3.04 (1999 Kan. Ct. R. Annot. 23), which provides that if no official record of a proceeding is available "a party to an appeal may prepare a statement of the evidence or proceedings from the best available means, including his own recollection, for use instead of a transcript." Adverse parties may serve objections or propose amendments to the statement and "the statement with objections or proposed amendments shall be submitted to the judge of the district court for settlement and approval, and as settled and approved shall be included in the record on appeal by the clerk of the district court." Stuber, however, failed to comply with Rule 3.04 because the record on appeal does not include one statement settled and approved by the trial court, but rather numerous conflicting letters and affidavits. This court is not a finder of fact and is precluded from judging the credibility of the affidavits and letters. See *State v. Noriega*, 261 Kan. 440, 446, 932 P.2d 940 (1997). Moreover, if the letter from the trial court constitutes the "settled and approved" statement of the in-chambers discussion, the statement calls into question the validity of Stuber's affidavit. In the absence of a record which affirmatively shows that Stuber's right to a jury trial was violated, this court presumes that the action of the trial court was proper. See *State v. Moncla*, 262 Kan. 58, Syl. ¶ 2, 936 P.2d 727 (1997).

As a result, this court must focus on the statements made at the waiver hearing in deciding whether substantial competent evidence supports a finding that Stuber voluntarily waived his right to a jury trial. Because the trial court explained to Stuber the rights he was waiving by agreeing to a bench trial and because Stuber orally indicated on the record that he intended to waive his right to a jury trial, we find that Stuber's waiver was voluntary.

Jurisdiction of the CFTC

Stuber's second argument on appeal is that the trial court lacked subject matter jurisdiction to hear his case because the transactions at issue are subject to the exclusive jurisdiction of the CFTC. Specifically, Stuber vigorously contends that the trial court erred in denying his motion to dismiss because the transactions in question involved commodity pools and are subject to the exclusive jurisdiction of the CFTC. The issue of whether the trial court had jurisdiction over the charges filed in this case is one of law subject to unlimited appellate review. See *State v. Snelling*, 266 Kan. 986, 988, 975 P.2d 259 (1999).

The jurisdiction of the CFTC is set forth at 7 U.S.C. § 2 (1994):

> "(i) The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in section 2a of this title, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"),

> and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title."

As a result, the CFTC "governs collective investment vehicles that engage in futures transactions, which are known as 'commodity pools.' " Ervin, CFTC *Regulation of Hedge Funds and Commodity Funds*, A.L.I./A.B.A. C.L.E. on Investment Management Regulation, 81 (Oct. 17, 1996).

The CFTC has consistently maintained that the Commodity Exchange Act (CEA) preempts state regulation of the operation of commodity pools. Snider, Regulation of the Commodities Futures and Options Markets § 10.07 (2d ed.1997) (hereinafter Commodities Futures) (citing CFTC & SEC Joint Explanatory Statement [Feb. 2, 1982]; CFTC Interpretative Letter No. 77-14 [Sept. 16, 1977]). Moreover, the CFTC has further declared that state regulation of the capital formation stages of commodity pools is also preempted by the federal act. Commodities Futures § 10.07 (citing Letter from the Secretary of the CFTC to North American Securities Administration Association [Feb. 27, 1981]). As a result, the federal government has exclusive jurisdiction to regulate commodities options. Because Congress has clearly indicated that its authority is exclusive with regard to commodities regulation, the states are precluded from exercising supplementary regulatory authority over those same activities. *International Trading, Ltd., et al. v. Bell*, 262 Ark. 244,

253-54, 556 S.W.2d 420 (1977), *cert. denied* 436 U.S. 956 (1978) (citing *Northern States Power Company v. State of Minnesota*, 447 F.2d 1143 [8th Cir. 1971]; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 91 L.Ed. 1447, 67 S.Ct. 1146 [1947]; *Campbell v. Hussey*, 368 U.S. 297, 7 L.Ed.2d 299, 82 S.Ct. 327 [1961]).

Although the federal government has nearly unlimited jurisdiction to regulate commodities options, the CFTC has declared specific exceptions to the general rule and in certain unique circumstances, jurisdiction over commodities transactions remains with the states. For example, the states may prosecute commodities fraud under general antifraud statutes. Commodities Futures § 10.19 (citing CFTC Memorandum to All State Securities Administrators [Oct. 8, 1976], *reprinted in* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. [CCH] ¶ 20,218, at 21,186). The CFTC has emphasized, however, that the statutes used for this purpose must be general antifraud provisions and not part of a more narrow regulatory scheme. Commodities Futures § 10.19 (citing Speech by CFTC Vice Chairman Rainbolt, II, before the North American Securities Administrators Conference [Sept. 9, 1975]).

Nevertheless, the above-mentioned exception is not applicable to the instant case because the State did not charge Stuber under a general antifraud statute. Instead, Stuber was charged with violating narrow statutory provisions criminalizing specific acts in connection with the sale of securities.

A second exception to the general rule that the federal government has exclusive jurisdiction over commodities regulation is that the states may assert extensive

jurisdiction over persons who are required to be registered under the CEA but have failed to do so. Commodities Futures § 10.19 (citing 7 U.S.C. § 16). More specifically, "anyone who should be registered with the CFTC but is not in fact registered is fair game for state and federal enforcement agencies." Commodities Futures § 10.19.

To determine whether this exception is applicable to the instant case it is first necessary to address whether Stuber was required to be registered with the CFTC. The CEA defines a "commodity pool operator" as

> "any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market. . . . " 7 U.S.C. § 1a(4) (1994).

In other words, a commodity pool operator "is a person who solicits funds from others for the purpose of pooling the funds . . . for use in investing in commodity interests." Commodities Futures § 5.06. An individual who meets the statutory definition of a commodity pool operator is subject to regulation by the CFTC unless excluded by the CEA. Commodities Futures § 5.06.

We find that Stuber qualifies as a commodity pool operator as defined by the CEA because he engaged in a business that was of the nature of an investment trust and

solicited and accepted funds from his investors to be used in the trading of commodities. See 7 U.S.C. § 1a(4) (1994). Thus, Stuber's commodities transactions are subject to the exclusive jurisdiction of the CFTC. In addition, it is important to note that even if the commodities transactions Stuber engaged in were excluded from the registration requirement (which they are not), Stuber would nevertheless be subject to regulation by the CFTC because he did not file a notice of eligibility. See 50 Fed. Reg. 15868 (1985); Commodities Futures § 5.06.

Stuber's qualification as a commodity pool operator is not affected by the fact that the pooled account agreement between him and the investors granted him discretion to trade in non-commodities futures and that Stuber invested in stocks and mutual funds. The federal regulations do not specify that an investment pool must trade solely in commodities for the manager of that pool to qualify as a commodity pool operator. See 7 U.S.C. § 1a(4) (1994). As a result, even though Stuber did not trade exclusively in commodities, he nevertheless qualifies as a commodity pool operator. Because Stuber was required to register as a commodity pool operator under the CFTC regulations but failed to do so, we find that the State had extensive jurisdiction to prosecute Stuber's actions.

Prosecution under the Kansas Securities Act

Although the State had jurisdiction to prosecute Stuber for his fraudulent actions, the State was nevertheless required to prosecute Stuber under the proper statutes. Thus, the issue remains whether the State properly prosecuted Stuber for violating state securities statutes.

Stuber was found guilty of violating K.S.A. 17-1253 (Ensley), which prohibits unlawful acts in connection with the offer, sale, or purchase of securities. In addition, Stuber was also convicted of engaging in business as a broker-dealer without being registered and offering for sale unregistered securities. The term "security" is defined in the Kansas statutes as

> "any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting-trust certificates; thrift certificates or investment certificates, or thrift notes issued by investment companies; certificate of deposit for a security; certificate of interest in oil and gas royalties, leases or mineral deeds; or, in general, any interest or instrument commonly known as a 'security,' or any certificate of interest or participation in, temporary or interim certificate for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." K.S.A. 17-1252(j) (Ensley).

Although the transactions at issue involve both commodities and non-commodities investments, the State asserts that the transactions in question violate the Kansas securities statutes. To support its position, the State cites *Schlatter v. Mo-Comm Futures, Ltd.*, 233 Kan. 324, 329, 662 P.2d 553 (1983), which held that when a capital-raising activity involves traditional forms of securities, it is subject to securities regulation under the Kansas securities laws.

Schlatter, however, is distinguishable from the case at issue in that *Schlatter* involved the selling of shares in a limited partnership for the purpose of pooling the funds to invest in the futures market, and the sale of limited partnership interests always involves the sale of securities. See *State v. Ribadeneira,* 15 Kan. App. 2d 734, 739, 817 P.2d 1105, *rev. denied* 249 Kan. 778 (1991). In our case, however, there was no sale of partnership shares but merely a pooling of funds into an investment account.

Furthermore, the *Schlatter* court recognized that "CFTC exclusive jurisdiction was not intended to extend to the capital-raising activities which *precede* transactions involving commodity futures." (Emphasis added.) 233 Kan. at 329. In the case at issue, Stuber's capital-raising activities did not precede the investment transactions involving commodities futures, but rather were interspersed with the investments. As a result, *Schlatter* does not support the State's position that the transactions in question constitute state securities violations.

The State additionally attempts to characterize the transactions in question as securities transactions by labeling them investment contracts. Under K.S.A. 17-1252(j), the definition of "security" includes an investment contract. An investment contract is generally defined as a contractual arrangement involving the investment of money in a common enterprise with the profits to come from the efforts of others. *Activator Supply Co. v. Wurth,* 239 Kan. 610, Syl. ¶ 4, 722 P.2d 1081 (1986). Kansas courts, however, have not addressed whether transactions similar to those at issue qualify as investment contracts.

Before analyzing whether the elements of an investment contract are satisfied in the instant case, it is necessary to address how the transactions in question can be labeled as commodities transactions under the federal regulatory scheme and also characterized as securities transactions for purposes of the state statutes. Although Stuber labels the transactions at issue as involving a commodity pool, the "pooled account agreement" Stuber executed with the investors clearly indicates that Stuber was not limited to investments in commodities futures. In fact, the pooled account agreement permits Stuber "to execute trades in [the investor's] behalf without any verbal or written authority from [the investor] and at SSI, Inc.'s discretion in accordance with the terms of this Agreement."

Moreover, the pooled account agreement does not list the types of investments Stuber was limited to, nor does it in any way confine the investments to the commodities market. In addition, Stuber's contracts with the three brokerage firms did not limit him to commodities investments. In fact, Stuber exercised wide investment discretion by investing in stocks and mutual funds under the name SSI, Inc. Thus, under the terms of the account agreements, Stuber not only had the discretion to invest in non-commodities, but he did in fact engage in non-commodities transactions. *Cf. Gordon v. Terry,* 684 F.2d 736, 740-41 (11th Cir. 1982), *cert. denied* 459 U.S. 1203 (1983) (holding that nondiscretionary investment contracts are not securities); *State v. Ameen,* (No. 81,373, filed March 10, 2000) (same).

These non-commodities investment activities destroy Stuber's contention that the investment account was a

commodity pool. Moreover, since Stuber did not segregate the investors' funds into an account separate from his personal checking account, Stuber cannot argue that the non-commodities investments were purchased with his personal funds rather than money from the investment pool. As a result, the investment pool Stuber operated can constitute an investment contract under the Kansas securities statutes, even though under the federal regulatory scheme Stuber qualifies as a commodity pool operator.

Because Stuber's investments were not limited to commodities, these transactions could qualify as investment contracts so as to bring them within the regulatory scope of the Kansas securities statutes. For example, the first element of an investment contract, an investment of money, is satisfied in the instant case. Here, the investors gave Stuber funds to be invested in the pooled account. Second, the transactions must involve a common enterprise in that the fortunes of the investors are interwoven with and dependent on the efforts and success of Stuber. See *Activator Supply,* 239 Kan. at 618-19. The investors' fortunes were dependent on Stuber's efforts because Stuber was to use his "expertise" when investing the funds. Moreover, the investors' success was interwoven with Stuber's success in that Stuber's contract with the investors was structured as a profit-sharing agreement. For example, if the investments were profitable, Stuber was entitled to 25% of the investors' profit. In addition, the third element of an investment contract is also satisfied because the investors gave Stuber their money with the expectation of future profits. Finally, the last requirement of an investment contract is fulfilled because the future

profits were to come from the efforts of others, namely Stuber. As a result, we find that the investment pool qualifies as an investment contract and, thus, as a security.

A cursory examination of the facts at issue might suggest that the State erred in charging Stuber with securities violations because his activities supposedly involved only commodities. However, because Stuber's pooled account agreement did not limit him to only commodities investments and because Stuber did not exclusively trade commodities, Stuber's investment activities made him subject to the Kansas securities statutes. As a result, because the State had extensive jurisdiction to prosecute Stuber's activities under the exception permitting the State to prosecute those individuals who are required to register under the CFTC but failed to do so, the State had jurisdiction to prosecute Stuber's fraudulent activities and did so under the proper statutes. As a result, Stuber's argument fails.

Sufficiency of the Evidence

Stuber's third argument on appeal is that he is entitled to a new trial because the State charged multiple alternate allegations in the counts of unlawful acts in connection with the sale of securities and the trial court did not specify the basis for its verdict as to each count. Stuber contends that the trial court's lack of specificity is problematic as there is insufficient evidence to convict him of the counts of unlawful acts in connection with the sale of securities. When the sufficiency of the evidence is challenged in a criminal case, the standard of review is

whether, after review of all the evidence, viewed in the light most favorable to the prosecution, an appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Johnson*, 266 Kan. 322, 326, 970 P.2d 990 (1998).

First, Stuber contends that a conviction under K.S.A. 17-1253(a)(2) cannot, as a matter of law, be based on a failure to disclose information which he was under no legal obligation to disclose. K.S.A. 17-1253(a)(2) makes it a crime for any person in connection with the sale of any security to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."

In the previous criminal appeal brought by Stuber, this court held that Stuber's failure to disclose his prior convictions to purchasers of securities violated K.S.A. 17-1253(a)(2). *Stuber*, 25 Kan.App.2d at 258. This court rationalized that the purpose of the Kansas Securities Act, K.S.A. 17-1252 *et seq.*, is to place promotion and dealing of speculative securities under rigid government control:

> "We conclude that permitting the seller of speculative securities to fail to disclose his or her convictions for crimes involving dishonesty could not possibly comport with the intent of the Kansas Securities Act. We believe that in order to carry out the stated purpose of the Kansas Securities Act, a seller of securities must disclose his or her criminal history to prospective buyers of the security. In the sale and purchase of securities, the honesty and integrity of the seller is of utmost importance. While having a criminal record may not necessarily mean the

> seller is dishonest and untrustworthy, it is certainly material in giving the buyer sufficient information to make a judgment on the facts he or she is told by the seller. We hold that a seller of securities commits an unlawful act in connection with that sale, under K.S.A. 1997 Supp. 17-1253(a)(2), by failing to disclose his or her criminal history to a prospective buyer, particularly when that history consists of convictions for crimes of dishonesty. A seller of securities under the Kansas Securities Act is intended to be an individual on whom the buyer may rely. This is an appearance which is made misleading by the failure of the seller to disclose his or her criminal background." 25 Kan.App.2d at 258.

Stuber contends that his previous criminal appeal was wrongly decided and relies on Judge Pierron's dissent in that case. Judge Pierron dissented in *Stuber* because he believed the majority was reading a requirement into the statute that the legislature had not intended:

> "The statutes of Kansas contain many provisions requiring a person with criminal convictions to disclose that information. This is not specifically required of a person selling securities. Given that the legislature obviously knows how to write in this requirement, a court inserting it into a criminal statute is not appropriate." 25 Kan.App.2d at 266-67 (Pierron, J., dissenting).

The problem with the above-mentioned dissent and Stuber's position on this issue is that both fail to recognize that many statutes are written in language that, while not unconstitutionally vague, are necessarily broad in scope to cover a myriad of factual situations. For

example, the battery statute proscribes intentional physical contact "when done in a rude, insulting or angry manner." K.S.A. 1999 Supp. 21-3412(a)(2). The child abuse statute proscribes "cruelly beating" and "inflicting cruel and inhuman corporal punishment." K.S.A. 21-3609. The indecent liberties with a child statute proscribes "lewd fondling or touching." K.S.A. 21-3503(a)(1). If the aforementioned statutes attempted to list specific prohibited acts, the list would be "massive in length and never complete." See *State v. Ponce*, 258 Kan. 708, 713, 907 P.2d 876 (1995).

Moreover, *State v. Bailey*, 251 Kan. 156, 171, 834 P.2d 342 (1992), addressed whether the aggravating factors used to justify a mandatory 40-year prison term for first-degree murder were unconstitutionally vague. The *Bailey* court held that the factors of creating a "great risk" of death to more than one person and committing the crime in an "especially heinous, atrocious or cruel manner" were not unconstitutionally vague. 251 Kan. at 173-74. The court noted: "It would be impossible to devise a laundry list of particular forms of killing that would encompass the intended subject. Thus, the statute has to rely on adjectives." 251 Kan. at 174.

The logic used in *Bailey* is also applicable in the instant case. It would be impossible to devise a complete list of facts that should be disclosed in connection with the offer, sale, or purchase of securities. As with other statutes, the Kansas Securities Act has to rely on an adjective to encompass the facts that must be disclosed: all "material" facts. K.S.A. 17-1253(a)(2).

Our Supreme Court, in denying review of Stuber's previous criminal appeal, effectively approved of this court's holding that a defendant's failure to disclose his criminal convictions to investors amounts to the omission of a material fact. As a result, Stuber's conviction under K.S.A. 17-1253(a)(2) can be based on his failure to disclose his criminal history because Stuber was under a legal obligation to disclose such information.

Stuber further contends that it is impossible to determine whether the trial court relied on legally sufficient grounds when convicting him under K.S.A. 17-1253(a)(2) because the trial court did not specify which of the multiple alternate allegations provided the basis for the convictions. Stuber alleges that because some of the multiple alternate allegations under which he was charged are legally insufficient to support his conviction, that portion of the verdict cannot be upheld.

To support his position on this issue, Stuber cites *Griffin v. United States*, 502 U.S. 46, 59, 116 L.Ed.2d 371, 112 S. Ct. 466 (1991), which rationalized:

> "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law – whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error."

The fallacy of Stuber's argument is that his case was not decided by a jury, but rather by the bench. The trial court made the finding that Stuber violated K.S.A. 17-1253(a)(2), and it can be assumed that, unlike a jury, the bench possessed sufficient intelligence and expertise to rely on a legally adequate theory.

Moreover, each of the facts listed in the second amended information are, in fact, material facts which Stuber should have disclosed to the investors. The facts Stuber failed to tell his investors, such as his outstanding civil judgments and a tax lien, are omissions of material facts because the defrauded investors indicated that the omitted facts would have been significant in deciding whether to purchase securities from Stuber. See *Branch-Hess Vending Serv. Emp. Pen. Tr. v. Guebert*, 751 F.Supp. 1333, 1340 (C.D. Ill. 1990). As a result, even though the trial court failed to specify its basis for finding that Stuber violated K.S.A. 17-1253(a)(2), the bench relied on legally sufficient grounds for the convictions because all of the omissions listed in the second amended information are omissions of material facts.

Next, Stuber claims that he is not guilty of unlawful acts in connection with the sale of securities with respect to Elder and Farber because essential elements of the crime occurred before the dates alleged in the second amended information. Specifically, Stuber contends that the "sale" of securities to Farber and Elder occurred when these investors signed their pooled account agreements with SSI, Inc. Stuber insists that because these agreements were signed prior to the dates set forth in the State's second amended information, any misrepresentations or omissions which occurred in relation to the sales

to Farber and Elder cannot be based on K.S.A. 17-1253(a)(2).

The Kansas Securities Act defines a "sale" as "every contract of sale, contract to sell, or disposition of, a security or interest in a security for value." K.S.A. 17-1252(h)(1). In addition, the act defines "offer" as "every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value." K.S.A. 17-1252(h)(2). The State presented evidence that Farber gave Stuber money to invest on four occasions between July 1, 1993, and January 18, 1994, the dates alleged in the State's second amended information. Moreover, the State also presented evidence that Elder gave Stuber funds to invest at least two different times between July 1, 1993, and December 9, 1993.

As a result, because Stuber was convicted of "unlawful acts in connection with the offer, sale, or purchase of securities" there is sufficient evidence to support Stuber's conviction on the counts relating to Elder and Farber in that Stuber offered and sold securities to these investors within the meaning of the Kansas Securities Act as alleged in the second amended information.

Next, Stuber contends that there is insufficient evidence to show that he used an artifice to defraud Botterweck because the State presented no evidence that Stuber gave Botterweck a bogus monthly trading summary.

K.S.A. 17-1253(a)(1) prohibits the use of any "device, scheme or artifice to defraud" in connection with the offer, sale or purchase of any security. While the false trading summaries Stuber gave to some of the investors provided proof of Stuber's fraudulent scheme, the lack of

such summaries in Botterweck's case does not undermine Stuber's conviction. Because K.S.A. 17-1253(a) is written in the disjunctive, a defendant can violate the statute without using a device or artifice, if he or she operates a scheme that defrauds an investor. As a result, even though Stuber did not provide Botterweck with a bogus monthly trading summary, Stuber was properly convicted under K.S.A. 17-1253(a)(1) because there is sufficient evidence that he operated a scheme to defraud Botterweck.

Stuber further contends that because the State did not articulate the basis for the charges under K.S.A. 17-1253(a)(3), it cannot be determined from the trial court's findings whether Stuber's convictions for unlawful acts in connection with the sale of securities were based on K.S.A. 17-1253(a)(1) or (3).

Stuber's contention is without merit. The trial court's finding that Stuber was guilty of unlawful acts in connection with the sale of securities under all three alternative subsections of K.S.A. 17-1253(a) is supported by sufficient evidence. The fact that the State failed to explain in its closing argument how Stuber violated K.S.A. 17-1253(a)(3) is irrelevant to the trial court's finding. Moreover, although the trial court merely made a general finding that Stuber defrauded the investors, the evidence supports the finding that Stuber's fraudulent activities violated all three subsections of K.S.A. 17-1253(a). As a result, it is irrelevant that the trial court failed to specify its basis for the finding that Stuber violated K.S.A. 17-1253(a)(3), and Stuber's convictions for unlawful acts in connection with the sale of securities are affirmed.

Venue Over Charge Relating to Sale of Securities to Sumner County Resident

Next, Stuber argues that the trial court did not have venue over the charge of unlawful acts in connection with the sale of securities to Elder, a Sumner County resident. Specifically, Stuber contends that because all of his contacts with Elder took place at Elder's residence in Sumner County, venue was improper in Sedgwick County.

The resolution of this issue requires the interpretation and application of the statute prohibiting unlawful acts in connection with the sale of securities as it relates to venue under the provisions of K.S.A. 22-2602. Statutory interpretation is a question of law, and this court has unlimited review of questions of law. See *State v. Jurdan*, 258 Kan. 848, 850, 908 P.2d 1309 (1995).

The general rule of venue is that venue lies in the county where a criminal act occurs. K.S.A. 22-2602. However, "[w]here two or more acts are requisite to the commission of any crime and such acts occur in different counties the prosecution may be in any county in which any of such acts occur." K.S.A. 22-2603. Thus, where one or more elements of a crime occur in one county and other elements of that crime take place in a second county, venue properly lies in either county. See *State v. Korbel*, 231 Kan. 657, Syl. ¶ 3, 647 P.2d 1301 (1982).

Although the Kansas appellate courts have not addressed the issue of venue with regard to the crime of unlawful acts in connection with the sale of securities, decisions regarding venue as to other crimes provide a helpful analogy. First, *State v. Cuezze, Houston & Faltico*,

225 Kan. 274, 589 P.2d 626 (1979), addressed whether the trial court had venue over the charge of making a false writing. The defendant contended that the trial court in Wyandotte County lacked venue because the falsified application was filed in Shawnee County. The court held that "assuming the alleged false application was partially prepared in Wyandotte County and completed and filed in Shawnee County, the venue of the charges would lie in either county." 225 Kan. at 281.

Cuezze relied on an early Kansas Supreme Court case, *State v. Mason*, 61 Kan. 102, 58 P. 978 (1899), in making its decision. The issue presented in Mason was whether the trial court in Marion County had jurisdiction over the defendant's charges of making false statements and reports to the state bank commissioner. The defendant asserted that Marion County lacked venue because the reports were to be filed with the bank commissioner in Shawnee County. Our Supreme Court rejected Mason's argument and held that venue was proper in Marion County because "[t]he principal steps in the transaction were taken in Marion county; the statement and report were prepared there; it was subscribed and sworn to in Marion county, and before a notary public of that county." 61 Kan. at 109. The *Mason* court concluded that "the offense has been committed partly in each of the counties named, and . . . jurisdiction is in either county." 61 Kan. at 109.

The *Cuezze* court also cited *In re Myers*, 119 Kan. 270, Syl. ¶ 1, 237 Pac. 1026 (1925), *overruled in part on other grounds State v. Breitenbach*, 190 Kan. 189, 373 P.2d 601 (1962), which held that "[w]here a worthless check is given by the maker in lieu of a similar worthless check

for the same amount [and] both checks being issued in apparent violation of [a criminal statute], and the second check is executed in one county and transmitted by United States mail to the payees in another county, the jurisdiction of the offense is in either county."

After consideration of the above-mentioned precedents, we find that Stuber committed elements of the crime of unlawful acts in connection with the sale of securities in both Sedgwick and Sumner Counties and, thus, the trial court in Sedgwick County had venue over the charge at issue. The principal acts in connection with the unlawful sale of securities to Elder were conducted in Sedgwick County. Specifically, Stuber kept an office in Sedgwick County from which he operated his fraudulent scheme; he had telephone discussions with Elder from Sedgwick County; he prepared bogus monthly trading reports and mailed them via United States mail to Elder from Sedgwick County; and he deposited the checks he received from Elder into a checking account in Sedgwick County.

As a result, there is substantial evidence that Stuber committed each alternative element of K.S.A. 17-1253(a) in Sedgwick County, and the trial court had venue over the charge at issue. Thus, Stuber's conviction for unlawful acts in connection with the sale of securities to a Sumner County resident is affirmed.

Challenge to Criminal History Score

Finally, Stuber contends that the trial court erred in denying his challenge to his criminal history score. Specifically, Stuber argues that his convictions for one count of gambling and two counts of giving a worthless check should not be used as part of his criminal history because those convictions were set forth in the complaint as elements of the crimes charged and cannot be used to calculate his criminal history score. Stuber acknowledges that the real issue is whether the worthless check convictions should be counted in his criminal history because the gambling conviction does not affect his criminal history score since it is a misdemeanor conviction.

As a general rule, interpretation of the Kansas Sentencing Guidelines Act is a question of law, and the appellate court's scope of review is unlimited. *State v. Bolin,* 266 Kan. 18, 24, 968 P.2d 1104 (1998). In this case, however, the general rule does not apply because the question Stuber raises is moot and, therefore, unreviewable. An issue becomes moot when the judgment of the appellate court on the issue would be of no consequence. *Sheila A. v. Finney,* 253 Kan. 793, 797, 861 P.2d 120 (1993).

The trial court found that Stuber's criminal history score was category "E" based on six nonperson felonies: two felony convictions for giving a worthless check and four convictions stemming from Stuber's fraudulent Agri-Data activities. A defendant's criminal history score is scored "E" when the offender's criminal history includes three or more adult convictions for nonperson felonies, but no convictions for a person felony. K.S.A. 21-4709.

In his brief, Stuber concedes that even without the convictions set forth in the complaint, his criminal history score would still be "E" based on four nonperson felonies. Nevertheless, Stuber argues that the question of whether the worthless check convictions should have been included in his criminal history is not moot because the remaining four nonperson felony convictions stemming from his involvement in Agri-Data are currently before the Kansas Supreme Court on a petition for review. Stuber contends that "[i]f the Supreme Court were to reverse some or all of those convictions, the question of whether the worthless check convictions should be included in his criminal history would take on major significance."

The fallacy of Stuber's argument is that our Supreme Court denied his petition for review of the Agri-Data convictions before the filing of his brief in the instant case. See *State v. Stuber*, 25 Kan.App.2d 254, 962 P.2d 1104, *rev. denied* 265 Kan. 889 (1998). Giving Stuber the benefit of the doubt, however, our Supreme Court denied review of Stuber's Agri-Data case the day before he filed his brief for this case, and he might not have known that review of the Agri-Data case was denied. Even so, Stuber neglected to inform this court upon learning that this issue was moot.

As a result, this court refuses to review the present issue because the question raised is moot in that Stuber's criminal history score would not be affected by this court's finding that the trial court erred in considering

the felony convictions listed in the State's complaint against Stuber.

Affirmed.

No. 80,074

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

J. SCOTT STUBER,
Appellant.

ORDER

Appellant, J. Scott Stuber, requests that this court modify its opinion in the above-captioned matter or, in the alternative, grant a rehearing.

1. Stuber first argues that this court should grant his motion for modification or rehearing because 7 U.S.C. § 16(e) prohibits the State from prosecuting him for state securities violations because the Commodities Futures Trading Commission (CFTC) did not specifically authorize the prosecution. The pertinent language of 7 U.S.C. § 16(e) is as follows:

> "Nothing in this chapter shall supersede or preempt . . . (3) the application of any Federal or State statute, including any rule or regulation thereunder, to any person required to be registered or designated under this chapter who shall fail or refuse to obtain such registration or designation.
>
> "The Commission may refer any transaction or matter subject to such other Federal or State statutes to any department or agency administrating such statutes for such investigation, action, or proceedings as that department or agency shall deem appropriate."

a. Stuber mischaracterizes the second portion of the statute as a condition precedent to the state's authority to exercise jurisdiction. The second portion of the statute is not a condition precedent of 7 U.S.C. § 161(e), but rather a separate discretionary provision allowing the CFTC to "refer *any* transaction or matter" to another department or agency. The statute does not expressly require the states to obtain authorization from the CFTC in order to prosecute under 7 U.S.C. § 16(e).

b. If Congress intended to require the CFTC's authorization before the states could prosecute under 7 U.S.C. §16(e), such would have been expressly provided in the Commodities Exchange Act (CEA). Other sections of the CEA contain specific requirements that the states must fulfill before prosecuting. See 7 U.S.C. § 6d (granting state officials statutory authority to bring civil actions in federal court to enforce the CEA and the CFTC's rules, regulations, and orders, but the state must give the CFTC immediate notice of the filing of such action); 7 U.S.C. § 13a-2(8) (granting state officials statutory authority to prosecute in state court under the antifraud provisions of the CEA or the CFTC's regulations, but the state must provide the CFTC with prior written notice of its intention to institute such a proceeding).

c. Because the State was not required to obtain the CFTC's permission prior to prosecuting Stuber for securities violations, Stuber's first argument fails.

2. In his motion for modification or rehearing, Stuber additionally argues that this court's decision in his case is based on a factual finding that is not supported by the record. Specifically, Stuber alleges that the record

does not support the finding that he was not registered with the CEA. Stuber correctly notes that there was no evidence introduced at trial that he as not registered with the CEA.

a. In his motion to dismiss for lack of jurisdiction, Stuber argued to the trial court that the State lacked jurisdiction because the transactions in question involved commodities subject to federal regulation, and not securities subject to state regulation. Stuber's argument that the transactions involved commodities certainly would have been bolstered had he provided evidence that he was registered as a commodities broker with the CEA. Stuber's unexplained failure to produce such evidence permits an inference that it would be unfavorable to him.

b. Several Kansas appellate court cases have applied similar presumptions. See, *e.g.*, *In re Ratner*, 194 Kan. 362, 366, 399 P.2d 865 (1965) ("Where relevant, material evidence is within the control of a litigant, whose interest would naturally be served by its production, his unexplained failure to produce it permits an inference that it would be unfavorable to him"); *Home Life Ins. Co. v. Clay*, 13 Kan. App. 2d 435, Syl. ¶ 2, 733 P.2d 666 (1989) ("Failure to produce records and documents within a party's control raises a presumption that the evidence which would be disclosed by those records is unfavorable to that party.").

c. Because Stuber failed to produce evidence that he was registered with the CEA when such evidence would have been crucial to his motion to dismiss for lack of jurisdiction, we infer that such evidence would have

been unfavorable to him, that is, that he was not registered with the CEA. As a result, Stuber's argument that the record does not support the finding that he was not registered with the CEA fails.

3. Stuber's motion for modification or rehearing is denied.

BY ORDER OF THE COURT this 29th day of March, 2000.

For the Court

/s/ J. Patrick Brazil
J. Patrick Brazil
Chief Judge

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATE OF KANSAS, APPELLEE,
V NO. 97-80074-A
J. SCOTT STUBER, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR MODIFICATION OF ORDER DENYING APPELLANT'S MOTION FOR MODIFICATION OF OPINION OR REHEARING ON ISSUE II. DENIED.

DATE: 04/17/2000.

CAROL G. GREEN
CLERK

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS, APPELLEE,
V
NO. 97-80074-AS
J. SCOTT STUBER, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY J. SCOTT STUBER. CONSIDERED BY THE COURT AND DENIED.

DATE: 06/13/2000.

CAROL G. GREEN
CLERK

Frank E. White Jr. #07686
Assistant District Attorney
Sedgwick County Courthouse
535 North Main
Wichita, Kansas 67203
316-383-7281

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS, PLAINTIFF,	)	
vs.	)	CASE NO. 96 CR 1844
J. SCOTT STUBER DEFENDANT.	)	

ORDER

(Filed Oct. 27, 1997)

Now on this 27th day of June, 1997 comes on for hearing the motion of defendant to dismiss the above captioned case. Plaintiff appears by and through Frank E. White, Jr., Assistant District Attorney. Defendant appears personally and by and through Terry Beall, Assistant Public Defender. There are no other appearances.

Thereupon, the matter proceeds to hearing, and plaintiff and defendant make argument to the Court.

Thereupon, the Court, having heard the statements of counsel and being fully advised in the premises, and having reviewed the memorandums filed with the Court, finds as follows:

1. This case is controlled by *SCHLATTER V. MO-COMM FUTURES, LTD.*, 233 Kan. 324, 662 P.2d 553.

2. 7 U.S.C. § 2 Does not apply.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED the motion of defendant is denied.

/s/ Gregory L. Waller
GREGORY L. WALLER
District Court Judge

Approved:

/s/ Frank E. White, Jr.
Frank E. White, Jr.
Assistant District Attorney

/s/ Terry Beall
Terry Beall
Assistant Public Defender

7 U.S.C. § 2. Accounts, agreements, and transactions subject to jurisdiction of Commodity Futures Trading Commission; relation to jurisdiction of Securities and Exchange Commission and Federal and State courts; excepted transactions

(i) The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in section 2a of this title, with respect to accounts, agreements (including any transaction which is of the character of, or is commonly known to the trade as, an "option", "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for future delivery, traded or executed on a contract market designated pursuant to section 7 of this title or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 23 of this title. Except as hereinabove provided, nothing contained in this section shall (I) supersede or limit the jurisdiction at any time conferred on the Securities and Exchange Commission or other regulatory authorities under the laws of the United States or of any State, or (II) restrict the Securities and Exchange Commission and such other authorities from carrying out their duties and responsibilities in accordance with such laws. Nothing in this section shall supersede or limit the jurisdiction conferred on courts of the United States or any State. (ii) Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless

such transactions involve the sale thereof for future delivery conducted on a board of trade.

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7 U.S.C. § 13a-2. Jurisdiction of States

(1) Whenever it shall appear to the attorney general of any State, the administrator of the securities laws of any State, or such other official as a State may designate, that the interests of the residents of that State have been, are being, or may be threatened or adversely affected because any person (other than a contract market, clearinghouse, floor broker, or floor trader) has engaged in, is engaging or is about to engage in, any act or practice constituting a violation of any provision of this chapter or any rule, regulation, or order of the Commission thereunder, the State may bring a suit in equity or an action at law on behalf of its residents to enjoin such act or practice, to enforce compliance with this chapter, or any rule, regulation, or order of the Commission thereunder, to obtain damages on behalf of their residents, or to obtain such further and other relief as the court may deem appropriate.

(2) The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia, shall have jurisdiction of all suits in equity and actions at law brought under this section to enforce any liability or duty created by this chapter or any rule, regulation, or order of the Commission thereunder, or to obtain damages or

other relief with respect thereto. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder, including the requirement that the defendant take such action as is necessary to remove the danger of violation of this chapter or of any such rule, regulation, or order. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Immediately upon instituting any such suit or action, the State shall serve written notice thereof upon the Commission and provide the Commission with a copy of its complaint, and the Commission shall have the right to (A) intervene in the suit or action and, upon doing so, shall be heard on all matters arising therein, and (B) file petitions for appeal.

(4) Any suit or action brought under this section in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the act or practice occurred, is occurring, or is about to occur, and process in such cases may be served in any district in which the defendant is an inhabitant or wherever the defendant may be found.

(5) For purposes of bringing any suit or action under this section, nothing in this chapter shall prevent the attorney general, the administrator of the State securities laws, or other duly authorized State officials from exercising the powers conferred on them by the laws of such

State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) For purposes of this section, "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(7) Nothing contained in this section shall prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal antifraud statute of such State.

(8)(A) Nothing in this chapter shall prohibit an authorized State official from proceeding in a State court against any person registered under this chapter (other than a floor broker, floor trader, or registered futures association) for an alleged violation of any antifraud provision of this chapter or any antifraud rule, regulation, or order issued pursuant to the chapter.

(B) The State shall give the Commission prior written notice of its intent to proceed before instituting a proceeding in State court as described in this subsection and shall furnish the Commission with a copy of its complaint immediately upon instituting any such proceeding. The Commission shall have the right to (i) intervene in the proceeding and, upon doing so, shall be heard on all matters arising therein, and (ii) file a petition for appeal. The Commission or the defendant may remove such proceeding to the district court of the United States for the proper district by following the procedure for removal otherwise provided by law, except that the petition for removal shall be filed within sixty days after service of

the summons and complaint upon the defendant. The Commission shall have the right to appear as amicus curiae in any such proceeding.

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7 U.S.C. § 16. Commission operations

* * *

(e) Relation to other laws, departments, or agencies

Nothing in this chapter shall supersede or preempt –

(1) criminal prosecution under any Federal criminal statute;

(2) the application of any Federal or State statute, including any rule or regulation thereunder, to any transaction in or involving any commodity, product, right, service, or interest (A) that is not conducted on or subject to the rules of a contract market, or, in the case of any State or local law that prohibits or regulates gaming or the operation of "bucket shops" (other than antifraud provisions of general applicability), that is not a transaction or class of transactions that has received or is covered by the terms of any exemption previously granted by the Commission under subsection (c) of section 6 of this title, or (B) (except as otherwise specified by the Commission by rule or regulation) that is not conducted on or subject to the rules of any board of trade, exchange, or market located outside the United States, its territories or possessions, or (C) that is not subject to regulation by the Commission under section 6c or 23 of this title; or

(3) the application of any Federal or State statute, including any rule or regulation thereunder, to any person required to be registered or designated under this chapter who shall fail or refuse to obtain such registration or designation.

The Commission may refer any transaction or matter subject to such other Federal or State statutes to any department or agency administering such statutes for such investigation, action, or proceedings as that department or agency shall deem appropriate.

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17 C.F.R. § 4.13 Exemption from registration as a commodity pool operator.

(a) A person is not required to register under the Act as a commodity pool operator if:

(1)(i) It does not receive any compensation or other payment, directly or indirectly, for operating the pool, except reimbursement for the ordinary administrative expenses of operating the pool;

(ii) It operates only one commodity pool at any time;

(iii) It is not otherwise required to register with the Commission and is not a business affiliate of any person required to register with the Commission; and

(iv) Neither the person nor any other person involved with the pool does any advertising in connection with the pool (for purposes of this section, advertising includes the systematic solicitation of prospective participants by telephone or seminar presentation); or

(2)(i) The total gross capital contributions it receives for units of participation in all of the pools that it operates or that it intends to operate do not in the aggregate exceed $200,000; and

(ii) None of the pools operated by it has more than 15 participants at any time. For purposes of computing the number of participants for paragraph (a)(2)(ii) of this section, the following participants shall be excluded:

(A) The pool's operator, commodity trading advisor, and the principals thereof; and

(B) Any relative, spouse or relative of such spouse living in the same household as such participant.

* * *

KANSAS STATUTES ANNOTATED
KANSAS SECURITIES ACT

17-1253. Unlawful acts in connection with offer, sale or purchase of securities; qualifications; assignment defined; penalty.

(a) It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

(1) To employ any device, scheme or artifice to defraud;

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make

the statements made, in the light of the circumstances under which they are made, not misleading; or

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

* * *

K.S.A. 17-1254. Registration required for broker-dealer, agent, investment adviser or investment adviser representative; federal covered advisers; application; rules and regulations; fees; denial, suspension, revocation or cancellation of registration; central registration repository.

(a) It is unlawful for any person to transact business in this state as a broker-dealer or agent unless that person is registered under this act, except in transactions exempt under K.S.A. 17-1262, and amendments thereto.

* * *

K.S.A. 17-1255. Unlawful to sell or offer for sale certain unregistered securities; penalty.

(a) It is unlawful for any person to offer or sell any security in this state, unless:

(1) It is registered under this act;

(2) the security or transaction is exempt under K.S.A. 17-1261 or 17-1262, and amendments thereto; or

(3) it is a federal covered security for which the fee has been paid and documents have been filed as required by K.S.A. 1999 Supp. 17-1270a.

(b) A conviction for an intentional violation of this section is a severity level 7, nonperson felony. Any violation of this section committed on or after July 1, 1993, resulting in a loss of $25,000 or more, regardless of its location on the sentencing grid block, shall have a presumptive sentence of imprisonment.